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THE EXPANSION OF AMERICAN ADMINISTRATIVE LAW

BY leaps and bounds public sentiment in the present generation has increased in favor of extending governmental control over affairs we once thought sacredly private. There is a desire, even a clamor, for public regulation, state or national, in matters which before the Civil War the nation conceived concerned only the persons directly interested. More accurately stated, we have come to see that in most problems it is not a few people who are interested, but all the people. And all the people must be represented in some way and their interest in the settling of a particular dispute or the solution of a given problem must be considered. So we have seen commissions to regulate railroads and public utilities, commissions to regulate banks, commissions to regulate insurance, commissions to regulate the relations of labor with employers and employment.

Now we have come to a stage where we must not only build anew, but also keep in order the structures existing. Already there has arisen the fear that these public bodies, set to solve given problems, may develop into tyrannous institutions, amenable to no law and subject only to the doubtful safeguards of political action.

There is a body of law, the writer believes, which is well developed and which is capable of dealing with these questions. It is here contended that in American administrative law there are safeguards which answer the nascent popular fear referred to. The object of this argument is to show that administrative law has developed in such a way that commissions, bureaus, and bodies of like type fall into a perfectly organized, perfectly defined place. As we have learned to use these commissions, they have made their own law. Put epigrammatically, it is here contended that administrative law has expanded coincidentally with administrative machinery.

In outlining this conception, it must be said at the threshold

that such law is of general application; it concerns all the governmental machinery. Just as in government we study the functions of each bit of machinery, so in administrative law we should study the law which creates it, which governs its exercise, which limits its function, and which repairs the wrong it does when it goes amiss. In an attempt to formulate some systematic method of approach to these questions the following propositions will serve as the general divisions of the argument:

First. That administrative law is the law applicable to the transmission of the will of the state, from its source to the point of its application.

Second. That this transmission involves all the so-called "three powers" — legislative, executive, and judicial.

Third. That in many instances the differentiation of these three functions is impossible, and instead of using the general governmental machinery we erect a specialized instrument.

Fourth. That in such cases the special instrument, in the first instance, excludes the general machinery from its field.

And thereafter the study of administrative law must branch out into specialized investigation of the particular general machinery or special instrument in which the student is interested.

First. Administrative law is the law applicable to the transmission of the will of the state, from its source to the point of its application.

We look backward a moment at the definitions of administrative law already formulated.

The word "administrative" will bear some examination. It has been called a synonym of "executive."¹ But its content has changed with the powers of the bodies to which it was applied. The Interstate Commerce Commission, it has been suggested, acts in a legislative, or administrative, capacity, but not judicially.² Yet even when this was said, there was an unusually able opinion in which it was stated that this Commission "is an administrative body . . . lawfully created, and lawfully exercising powers which

¹ *Brazell v. Zeigler*, 26 Okla. 826, 110 Pac. 1052 (1910).

² *Missouri, K. & T. R. Co. v. Interstate Commerce Commission*, 164 Fed. 645 (1908).

are quasi-judicial";³ and instances might be multiplied of similar contradictions. The confusion seems to be upon the subject of administrative power or function. There is little or no dispute either as to what constitutes an administrative body or as to the nature of administrative law. It seems to be assumed that the one is an executive arm of the government creating it and that the other deals with the safeguarding of private rights from such executive, and with the protection of such officials in fulfilling their task.⁴ To the first idea we owe a fear, rapidly growing in the public mind and not unknown even to legal thought (as Mr. Dicey's comment⁵ upon the *Arlidge* case revealed), that expansion of governmental activity along these lines means bureaucracy; and to the second, that the law may not supply the protection which political activity, as we know from bitter experience, does not afford.

There is a long and fascinating history connected with these conceptions, which is here outlined. Curiously, the relation of it

³ *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, 64 Fed. 981, 982 (1894).

⁴ ERNST FREUND, *CASES ON ADMINISTRATIVE LAW*, Introduction, 3: "The chief concern of administrative law [as contrasted with political science], on the other hand, as of all other branches of civil law, is the protection of private rights, and its subject-matter is therefore the nature and mode of exercise of administrative power and the system of relief against administrative action."

I GOODNOW, *COMPARATIVE ADMINISTRATIVE LAW*, 7-8: "Administrative law is that part of the law which governs the relations of the executive and administrative authorities of the government"; which deals with the organization of these administrative bodies and the like, and which supplements thereby constitutional law.

And again, GOODNOW, *PRINCIPLES OF ADMINISTRATIVE LAW IN THE UNITED STATES*, 12: "Further, the adoption of the principle of the separation of powers, which was made theoretically a part of American public law, has done much to make the *executive or administrative authorities, generally*, independent of the legislative authority." (Italics ours.) It will be noted no distinction is made between executive and administrative action. The corollary proposition is stated *ibid.*, at page 15: "Authorities mainly political control administration; and authorities mainly administrative influence politics." The writer believes this theory unduly narrows the field.

⁵ A. V. Dicey, "Development of Administrative Law in England," 31 L. QUART. REV. 148, *à propos* of *Local Government Board v. Arlidge*, [1915] A. C. 120, establishing that a department required to exercise judicial functions need not adopt the procedure of courts.

"It may lead to the result," he writes at page 151, "that a government department which is authorized by statute to exercise a judicial or quasi-judicial authority may, or rather must, exercise it in accordance, not with the procedure of the law courts, but with the rules which are found to be fair and convenient in the transaction of the business with which the department is officially concerned."

anticipates in some measure the argument for revising the form which these ideas take. However the theory of division of powers may stand as a philosophical proposition, it is firmly ingrafted into American law, primarily by constitutional provisions, and secondarily and more effectively by five generations' habit of legal reasoning. A law which pertained to all officials, of any sort, was feared as containing the possibility of creation of a privileged class. It was believed that the effect of continental administrative law, whose strongest advocate was Napoleon, had been exactly this. It is only within the past few years that M. Léon Duguit, feeling at length the injustice of this assumption, took up his pen to defend the French administrative courts.⁶ Transfer of power to bodies which were responsible primarily to the political branch of the government was jealously scanned by the courts. Often it was prevented altogether by a rigid application of the doctrine of division of powers.

Consequently in the early creation of commissions, as their structure was obviously not that of courts (this is a late development, this enactment that commissions shall be "courts of record"), and could not constitutionally be that of legislative bodies, the only possible branch of government to relate them to was the executive. They were therefore regarded as executive arms. Every act attempted by them, every solution of the problems set before them, had to justify itself in the courts as an exercise of executive function. It is elementary law that courts will not attempt to control the coördinate branches of the government save (substantially) where their action results in confiscation or fails to accord with constitutional and statutory requirements. Therefore in self-defense these bodies tried to assimilate their growing power of application of governmental desire to private persons and property, to the executive or political branch of the state.

Then came a second stage, which we shall review more carefully hereafter. It was not possible to assimilate all the new powers to the executive branch. Courts began to talk of "quasi-

⁶ Léon Duguit, "French Administrative Courts," 29 POL. SCI. QUART. 385. "To foreigners, and particularly to Anglo-Saxons, who are inclined to assume that the individual can be protected against the administration only by giving wide competence and strong organization to the ordinary courts of justice, the foregoing statements [*i.e.*, that France has unusually efficient protection against arbitrary administrative action] may seem paradoxical."

judicial" and "quasi-legislative" functions. They began to be astute to escape the fancied limitation of prohibited delegation of power. In a word, they began to break down the dividing walls between the three powers.

We have, in approaching this problem, that best of all testimony, the quiet observation of a stranger to our system. A book which passed almost unnoticed in this field, because it was never translated into English, attacked the British administrative problem from a continental angle. In his "*Englische Verwaltungsrecht*,"⁷ Dr. Rudolf Gneist attempted to follow the English administrative system as he conceived it. It began with an expression of will at its source — the king — and the elaborate governmental machinery served to carry that will to its point of application — the people — and there make it effective and operative. He divided this machinery into two classes: Royal Prerogatives, which began and ended with the king's command; and special administrative departments — Privy Council; Treasury; State Secretaries and their subdivided departments; Parliament and subsidiary boards; courts of common law; of Chancery, with more specialized jurisdiction; the Established Church; and the Royal Court. All of these, he contended, were means whereby the royal will was brought through various stages into contact with the people whom it was meant to affect.

Now this opens the entire working of the state to the realm of administrative law. It challenges our whole narrow alignment of administrative problems. It suggests an illustration from practical life. The administrative machinery — the whole government, under this view — is not unlike the machinery which is used in mechanics to transmit power, from its motor source, to the point where it is brought into contact with the raw material requiring its application. In America the motive power is the popular will. The first step in its transmission is its expression in some authoritative way by legislative enactment or (even before the enactment) by political choice of officers, after a campaign in which some idea of the popular will is gathered. Thereafter the normal machinery for transmission is the system of regularly constituted governmental

⁷ DR. RUDOLF GNEIST, *ENGLISCHE VERWALTUNGSRECHT*, 2 vols., Berlin, 1863; second edition, 1867; third, 1871. Though this was widely read in Germany and France, it seems to have escaped the notice of common-law students completely.

agencies—the legislature, to express and make definite and tangible the popular idea; the executive, to express and make definite the enforcement of it and to apply it to the subject calling forth the expression; the judiciary, to limit the executive and to some extent the legislature to the confines of the expressed popular will. This is all administrative work. This is all administrative machinery. For it is submitted there can be no difference between the carrying from expression to action of an ordinary criminal or civil statute, and a similar transmission of a regulative statute with regard to some peculiar problem. The machinery may differ: the former goes through district attorneys' offices and police stations, to municipal courts and common jails; the latter passes from a commission sitting *in banc* to a single examiner, and through him to a chief of an engineering division or the like. We do not doubt that the latter is administrative in function and that the law applicable to it is administrative law. Is there any logical difference between this and the former commoner process?

Indeed, the proposition abroad would be no novelty. In France this is a well-known movement in juristic thought. It was Laferrière who, in his "*Droit Administratif*," summed up this matter:

"To *govern* is to oversee the functioning of the public authorities, to assure the execution of the laws, to carry on relations with foreign powers; to *administer* is to assure the daily application of the laws and to watch over the relations of the citizens with the public authorities and the relations between the different administrative ('executive' would be a better translation) authorities."⁸

There is the distinction. Government has to do with setting the popular will to work; to supply the personal guarantee that the machinery will do its part, to supply even the cogs and belts in the general machinery. Administration is the process of manufacture, if we may call it so. Administrative law is the law which keeps the process in motion in an orderly manner. It is the body of law, then, which governs the transmission of the active power, seeing that it does not waste itself in vain efforts to solve problems,

⁸ 4 LAFERRIÈRE, *DROIT ADMINISTRATIF*, 600. I have taken the translation by J. W. Garner in his "Judicial Control of Administrative Acts in France," 9 AM. POL. SCI. REV. 653 (1915). I prefer the translation "executive" to "administrative," because the sense of the passage seems to require it. "Administrative" merely reopens the verbal question once more.

seeing that it results in some effective end, seeing that it does not go amiss and commit some grievous wrong.

Second. This transmission involves all the so-called "three powers" — legislative, executive, and judicial.

The mind of a common-law lawyer, more especially in America, operates slowly on this sort of concept. What becomes, under it, of our tripartite division? What of our elaborate body of constitutional law?

The answer is, that in matters affecting the particular administrative bodies — commissions, bureaus, and the like — which formed our point of departure, we demand no tripartite division. We exercise all three functions — executive, judicial, legislative — with effectiveness and success. And we find no need of a division in the general rules of law applicable to the various functions, though, indeed, some division of them reappears. In his discussion of commission regulation of public utilities⁹ it was Freund who said that the commissions no longer served as mere instruments of a fully expressed legislative will, but took some part in the expression of it. One passage is especially striking:

"The evolution has been rather from generic legislation to administrative power to carry such legislation by specific requirements. . . ."

What is this but the transmission of public will through a commission without the expressed will as a preceding step, that is, the absorption, by an administrative body, of a function essentially legislative? Mr. McCall, in opposing the passage of the Hepburn bills on the floor of the House of Representatives, said they would make the commission "a little Congress and a little Court." The Supreme Court in its most conservative days gave a pronouncement which fairly supported the view, apart from its merits as an objection. In 1891 Texas established a railway commission, with power to make rates, regulate charges and practices, correct tariff abuses, prevent unjust discrimination, and the like.

⁹ Ernst Freund, "Substitution of Rule for Discretion," 9 AM. POL. SCI. REV. 666. "These commissions have indeed been vested with powers of a type hitherto withheld from administrative authorities under our system, powers which are not intended to serve as instruments of a fully expressed legislative will, but which are to aid the legislature in defining requirements that on the statute appear merely as general principles."

A man whose name is writ large in the history of governmental railway regulation, John H. Reagan, was a member of that commission. At the suit of one of the carriers involved in an order made by it, enforcement of the orders of this body was enjoined by a federal court; and Reagan, for the commission, prosecuted his appeal. The issue was joined upon delegation of power. Brewer, J., in sustaining the commission, said:

“There can be no doubt of the general power of a State to regulate the fares and freights which may be charged and received by railroad or other carriers, and that this regulation can be carried on by means of a commission. *Such a commission is merely an administrative body created by the state for carrying into effect the will of the state, as expressed by its legislation.*”¹⁰ (Italics ours.)

Again the concept of transmission of power. And on the next page the court fearlessly asserted that fixing a maximum railway rate was a legislative matter.¹¹ Yet the power was sustained. In this and other cases,¹² where it was argued that administrative bodies were objectionable as having both judicial and legislative as well as executive powers, they were upheld, although it was conceded that such an absorption of power actually had taken place.

The history of the matter was, that hostility to the new users of old powers — commissions and their like — had changed to a desire to uphold, if possible, the constitution of these new bodies. It was felt that while there may be, generically, three kinds of power, there may be no fundamental need for the separation of them. Men who had studied the question from an old-fashioned point of view approached the question with perhaps the greatest frankness. Mr. Dicey especially recognized that certain sorts of businesses could be handled only through some agency endowed with plenary powers, or, in American constitutional phraseology, that necessity justified limited delegation of legislative and judicial powers to specialized bodies. And behind all this was the unexplained, outstanding phenomenon of the municipal corporation exercising cheerfully all of our three divided powers — a bare, con-

¹⁰ *Reagan v. Farmers' Loan and Trust Co.*, 154 U. S. 362, 394 (1893).

¹¹ *Ibid.*, 395-96.

¹² See *The Railroad Commission Cases*, 116 U. S. 307 (1886), and cases there cited. The view is the more striking because it was adopted by a court which, besides being conservative, required above all other things close-knit, logical reasoning.

spicuous, unflinching exception to the constitutional tripartite division.¹³

So it came about that we found ourselves applying administrative law to bodies which were historically, perhaps, executive, but which were analytically combinations of all three of our governmental functions. From this we must reason backward. If the procedure of the Interstate Commerce Commission in a proceeding to award reparation is an administrative problem — a proposition which is undisputed — why is not the procedure of a police court, or a common-law court, or a court of equity? They are all questions of procedure to secure a stated end. If the method of conducting an immigration hearing is regulated by administrative law — and it doubtless is — why is not the procedure of a Senate committee gathering the ideas for coming legislation a similar administrative question? And so of contempt process, whether it be for refusal to testify before a court or a commission, or of any of five hundred instances.

Third. In many instances the differentiation of these three functions — legislative, executive, judicial — is impossible, and instead of using a general governmental machinery, specialized instruments are constructed.

We have now the problem stated. Administrative law is, if the foregoing reasoning is sound, not a supplement to constitutional law.¹⁴ It is a redivision of the various bodies of law which previously have been grouped under the head of constitutional law. That part of constitutional law relative to the functions of governmental bodies would, in its turn, form one part of administrative law as here sketched. Indeed, the difference between Goodnow's suggestion that administrative law supplements constitutional law and a use of "administrative law" as a name for the whole field, is not much more than a readjustment of nomenclature. The fact that the two forms of law are the same, and that the difference between them was the arbitrary one of the extent of a given document on the one side, or of unwritten law upon the other, is not seriously disputed.

¹³ See Stephen A. Foster's discussion of this whole development in "Delegation of Legislative Power to Administrative Officers," in 7 ILL. L. REV. 397 *et seq.*

¹⁴ See *ante*, note 4, last paragraph.

There is, then, this field called administrative law. It concerns the machinery of transmission of governmental will from the point of its origin to the point of its application. In its application to such machinery it cannot be referred to any one division of government; it is applicable alike to courts, legislatures, and executive. This is the range within which we are working.

Having bounded our country, in some sense, the next problem is to explore it. Into what division does this expanded subject of administrative law fall? At what point does the constitutional law relating to government meet the administrative law which we have invertedly developed from the rules applicable to commissions and similar bodies?

The primary distinction is a simple one. Much of the governmental machinery is of general importance; it serves to transmit the will of the state upon the great majority of questions. Most statutes, for example, are enacted by Congress — the general medium for expressing popular will. They are enforced by the executive authorities — the department of justice, the local police, and the like, who normally enforce all laws. They are interpreted by the courts whose regular function is to interpret such laws as Congress may enact. That is the usual, normal course of procedure; it is the general method of administration. But there arise problems which require peculiar and expert handling; a striking example is that of railway regulation. The popular will cannot be expressed by Congress, because the popular will does not discover a method. A result is wanted — better service and rates, freedom from discrimination and tyranny. No general body can reach that result: it takes an expert economist to formulate a rule. Accordingly we construct a *special* administrative body — a commission, like the Interstate Commerce Commission — and charge this body with the duty of investigating the problem and of laying down the rule which will reach the given result. The only expression of the popular will by Congress was the utterance of a desire to have an expert body solve a problem. Then the function of the general body — Congress — stopped, and that of the special body — the commission — began.

There is our first distinction. There are two sorts of administrative body — a general type, whose duty it is to carry on the main business of government, and a special type, whose

duty it is to render expert service in some field calling for that service.

The special body may supplement the general body at any stage of the transmission of power. So it is possible to have a commission establish a rule which thereafter becomes a law like other statutes, and enforced by the general machinery. A few years ago¹⁵ the uniform height of drawbars and hand-holds on freight cars was fixed by the American Railway Association in exactly this manner — an example of a special administrative body whose function was only within the narrow field of getting the popular will into tangible expression. Again, at the very bottom of the judicial administration of our penal law we find juvenile courts, which supplement in a specialized way the general machinery of police courts, in their particular field. The first example is of special administrative action at the very first stages of transmission of popular will; the second, at the very last stage. Instances might be multiplied each showing some different phase of this supplementation of general machinery by specialized instruments.

This brief distinction, moreover, gives us our first principle as to the nature of these special administrative bodies. They are bodies charged with the solution of a problem demanding expert treatment. They have no functions outside the field offered by this problem.

And the last and perhaps most important question here to be considered is the relation of these special administrative bodies — commissions, bureaus, and such bodies — to the tripartite division of powers and functions, to all of which, as we concluded above, administrative law ought to be applied. The writer here contends that a special administrative body — one of those instruments created specially for use in a limited field — may, and often does, exercise all three of the usual trinity of powers. It may, of course, operate upon a problem which requires that only one or two such powers be brought into play; but it may use any two, or all three, in combination.

The statement of the proposition requires that we go a stage

¹⁵ Act of March 2, 1893 (The Safety Appliance Act), 27 STAT. AT L. 531, § 5. The constitutionality of this was later upheld, over the contention of the railroads that this was a plain instance of delegation of legislative power. *St. Louis, Iron Mountain & Southern Ry. Co. v. Taylor*, 210 U. S. 281 (1908).

further back in the argument. What of the doctrine that powers cannot constitutionally be delegated? What of the rigidity of the division of powers? The answer must be that those doctrines applied, and were intended to apply, only to the great organs of government — the general administrative bodies, as we have here rechristened them. The principle here submitted is, that where efficient solution of the problem requires a separate instrument, this instrument may (as commissions and the like continuously have been) be the recipient of delegated powers, and may use any or all of them together.

We pause once more upon the history of the matter. From a desire to fetter the old commissions there grew up a desire to uphold them if possible. The quick motive was a public clamor that something be accomplished in respect of certain affairs. The complementary idea was a realization that plenary power vested in a single body was the only hopeful way of getting that result. Notably in public utility matters this desire made itself felt. Here there was historical warrant for delegation of power. As long ago as 1691 justices of the peace had been required to fix maximum rates for carriers.¹⁶ In other matters Mr. Dicey has commented¹⁷ on the impossibility of division of function where effective, expert action was required. In many cases the situation which calls this special instrument into being is made up of a group of closely related, highly complex problems; and to limit the commission, or whatever the instrument was called, other than by the nature of these problems was to bind it to uselessness. Occasionally the method of attack could be prescribed; more often not. Usually the only hope is to turn a body of experts loose on the question, instructing them to use their trained best judgment, their undoubted accessibility and consequent simplicity of procedure, and a wide range of powers designated in the statute creating the commission,

¹⁶ 3 WILLIAM and MARY, c. 12, § 24, par. xxiv (9 STAT. AT L. 154). "And whereas divers waggoners and other carriers, by combinations amongst themselves, have raised the prices of carriage of goods in many places to excessive rates, to the great injury of trade; be it therefore enacted, by the authority aforesaid, That the justices of the peace of every county . . . shall have power and authority and are hereby enjoined and required, at their next respective quarter or general sessions after *Easter* day yearly, to assess and rate the prices of all land carriage of goods whatsoever. . . ."

¹⁷ "Development of Administrative Law in England," 31 L. QUART. REV. 148, 150-51.

without technical checks. Further, it is often necessary that the results be uniformly applied. Railway rates are a striking example. It would have been intolerable for the situation to continue in which forty-eight state courts could each apply their idea of what was a reasonable rate. Neither the railway nor the shipper could endure the condition.

From such a situation it was necessary, first, that the commission have the power to make a rule. When it had used its expert knowledge, it had to put that decision into a form which compelled a solution; it had, in a word, to issue an order. But that is a legislative function. Then it had to see that these orders were uniformly applied: that one tribunal did not interpret them in one fashion, while another reached an exactly opposite application. Accordingly the commission had to dominate the general administrative bodies which applied the law, that is, take over part of the functions of courts. And though we wobbled in the matter of verbiage, and hedged about conclusions with nebulous distinctions, this is exactly what we have been doing.

For example, the Interstate Commerce Commission. Within a year after its creation the federal courts repudiated the idea that it was a court.¹⁸ Five years later it was said that the functions it exercised were "quasi-judicial";¹⁹ and the present method of stating the result is that the Commission has full authority to inquire into judicial matters.²⁰ There was the clear development of the idea that judicial power had crept into the Commission's panoply. In its early history the courts suggested that general orders of the Commission could not have been contemplated by Congress because they were legislative.²¹ Congress intervened

¹⁸ *Kentucky & I. Bridge Co. v. Louisville & Nashville R. Co.*, 37 Fed. 567 (1889), affirmed without opinion, 149 U. S. 777 (1892).

¹⁹ *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, 64 Fed. 981, 982 (1894). "It has been held that the Interstate Commerce Commission is not a court. It is an administrative body . . . lawfully created, and lawfully exercising powers which are quasi-judicial."

²⁰ See *Missouri, K. & T. R. Co. v. Interstate Commerce Commission*, 164 Fed. 645 (1908), in which it was conceded that the Commission could inquire into judicial questions, though not to the exclusion of courts. And in *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, 167 U. S. 479, 501 (1897), it was said: "The power given is partly judicial, partly executive and administrative, but not legislative." Cf. *Nelson v. Bd. of Health*, 186 Mass. 330, 335, 71 N. E. 693 (1904).

²¹ *Texas & Pacific Ry. v. Interstate Commerce Commission*, 162 U. S. 197 (1896).

before the courts had changed their way of thinking, and the present situation frankly arises from the fact that legislative power has been delegated.²² All the while, of course, it has never been questioned that the Commission had executive powers.

And there is the triad of power. But the Commission's own concept of its power is not without interest, especially in its later phases. A case arose in which the Pennsylvania Railroad had failed to supply enough tank cars for shippers' needs, and set up in excuse that it had not the cars to supply. It further contended that the Commission had no power to order it to provide cars. The Commission in reply conceded that it had only administrative power in the premises, meaning thereby (so far as one can judge from the much abused word "administrative") that it had judicial power to grant reparation — specific reparation, like a decree in equity, to be sure — but still nothing more than an individual decision of a case between individuals.²³ But within a year, in passing upon a proceeding to compel reestablishment of a joint rate, the opinion recited that "the establishment of a through route, like the fixing of a maximum rate for the future, is not a judicial act, but administrative or ministerial in furtherance of the function exercised by Congress. . . ." ²⁴ The language implies, and it is now conceded, that rate fixing is a legislative function. There, then, is yet another of the three powers concealed beneath this word "administrative" — a word which covers a body of powers wherein legislative and judicial capacities may be found. Yet this bit of history, applicable to the Interstate Com-

And see *Interstate Commerce Commission v. Cincinnati, New Orleans, etc. Ry. Co.*, *supra*, note 20.

²² *Louisville & Nashville R. Co. v. Interstate Commerce Commission*, 184 Fed. 118, 122 (1910). *A propos* of rate fixing, the court said: "As has been pointed out in the opinions of the Supreme Court, the power thus defined is legislative in its nature; and it is well settled upon a long series of decisions by that court . . . that, when this legislative power concerns the administrative affairs of the government, it may be delegated to an officer or a board . . . created for that purpose." The subsequent reversal of the decision did not reflect in any degree upon this holding.

²³ *Pennsylvania Paraffine Works v. Pennsylvania R. Co.*, 34 Int. Com. Rep. 179, 190 (1915). See also *Excelsior Rates from St. Paul*, 36 Int. Com. Rep. 349, 362.

²⁴ *Black & White River Transportation Co. v. Missouri Pacific Ry. Co.*, 37 Int. Com. Rep. 244, 248 (1915). The Commission in that same case refused to pass on the constitutionality of the Carmack Amendment, saying that this was for the courts alone.

merce Commission, might be repeated in the decisions concerning most of our great public service commissions; or indeed, for the matter of that, in the story of any similar body.

Since we have made this division into general and special administrative machinery, one confusion must be warded off before we leave the outlined distinction. The method of thought suggested involuntarily compels one to think along the line of administration, beginning with the laborious process of ascertaining the public will through a national election, through half-organized attempts to influence public opinion, through the more systematic program of legislative committee hearings, or through the most systematic method of a commission to investigate and recommend legislation; continuing, through the period of its enactment into some tangible form; of the statute, tossed into the hopper of executive and judicial machinery, to come out through some inferior police office as a full-fledged, effective, practicable rule, enforced instantly upon the community. And the instant query is — at the bottom of this mill, is not every instrument a special administrative? A police officer does not do the same work as any other police officer. He is dealing with a concrete situation — fitting a prohibitive law, for instance, to a given area. Why is not he of the same sort as a special commission?

The answer is, that though indeed he has a peculiar problem, it is not different in type from any other policeman's. He does not prohibit in the same place, and must to some degree fit his work to his community. But it is the same style of work. Further, he is the enforcing power behind every law. The next law of a general prohibitive nature will find him on his beat, putting the sanction of his night-stick and power of arrest behind it. In a word, he has not the blazing mark of a special administrative — a specialized field, calling for unusual, expert handling.

But the distinction may become nebulous. *Quære*, whether a traffic squad in New York City, under direction of the traffic division of the New York Police Office, is not a special administrative?

Nevertheless, we have our test. And it is not more difficult to apply than many similar tests in the common law. The distinction turns upon the limitation of the body under examination, to action with reference to a particular type of problem.

Fourth. A special administrative body, to the extent of its jurisdiction, excludes the operation of the general machinery in its field.

This is the last proposition we may examine in as brief a statement as this essay.

When a shipper sought to bring a proceeding to test the reasonableness of a rate in a federal court, without a previous adjudication by the Interstate Commerce Commission, that court declined jurisdiction upon the ground that the Interstate Commerce Commission was set to solve such problems, and that until such a solution had been obtained for review, no suit could be entertained.²⁵

When under the Massachusetts Workmen's Compensation Act, a workman brings action for compensation, he must do so before the Industrial Accident Board. This is by statute; but there is every reason to believe the rule would have been developed without this.

When there is a dispute as to the ownership of patentable ideas, and interference proceedings are under consideration in the Patent Office, a court will not take jurisdiction until the Patent Office has handed down an opinion.²⁶ And a court will not go into the question of patentability until the Patent Office has decided upon that question.²⁷

In a famous and startling decision the very verge of this doctrine was reached when the United States Supreme Court conceded that, as immigration officers, with proceedings to determine whether citizens and others were properly admissible into the country, had specialized and specific knowledge in the field of determining whether persons entering the country from abroad could rightfully do so, courts could not pass upon the question at all.²⁸ It is

²⁵ *Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426 (1906). And see *Mitchell Coal & Coke Co. v. Penn. R. Co.*, 183 Fed. 908 (1911), aff'd 223 U. S. 733; *Robinson v. Baltimore & Ohio R. Co.*, 222 U. S. 506 (1911); *Baltimore & Ohio R. Co. v. U. S. ex rel. Pitcairn Coal Co.*, 215 U. S. 481 (1910).

²⁶ *Butler v. Ball*, 28 Fed. 754 (1886), is the only case looking *contra* to this doctrine, and even this is not flatly opposed. See *Standard Scale & Foundry Co. v. McDonald*, 127 Fed. 709, 710 (1904): "It never was the mind of Congress that an inventor, without complying with the statutory scheme of submitting his claim to the Patent Office . . . could go into a United States court in the first instance to have determined the question of his right to a patent."

²⁷ *Continental Store Service Co. v. Clark*, 100 N. Y. 365, 3 N. E. 335 (1885).

²⁸ *United States v. Ju Toy*, 198 U. S. 253 (1905).

submitted that so far as this goes the reasoning is right. The ground where we may sharply differ in opinion is the decision as to the point at which the administrative field stopped. Doubtless Ju Toy's citizenship came within the field of the special administrative — the immigration departmental officials — in the first instance. But it does not follow that this special administrative branched off from the general body so far up in the transmission of power that the operation of it was not subject to corrective by the federal courts. The question, in any event, is upon the limit of the special administrative field.

In the *Arlidge* case²⁹ the English courts uniformly held that the question presented was one primarily for the special administrative and that the courts did not have the responsibility of deciding it.

These are all cases where the special administrative has excluded the courts from its field. The question instantly arises, How about the legislature? Does the Interstate Commerce Commission prevent Congress from prescribing a given rate in a given case? No. But if Congress does it, it has to that extent diminished the special administrative's statutory field. So far as that rate is concerned, the Commission has been destroyed. The Commission having been created by Congress may of course be annihilated by it. But the Commission and Congress cannot operate together in the same field.

Though the writer has not before him any case upon it, perhaps it is obvious that such an administrative body would exclude the action of an executive general instrument. Suppose after the Public Service Commission had prescribed a street-railway fare the governor of the commonwealth, or the mayor of the city or town where the railway lay, were to try to abrogate it. The absurdity of the case forecasts what a court would do to it. And its simplicity lies in this: a special administrative is always statutory or constitutional, like the rest of the executive machinery. In creating it, therefore, the legislature must have taken away the power of the executive to act. It has deprived the general executive of a part of its power.

And hence our proposition. Of necessity, a special administrative must exclude the general body — the court, the legislature,

²⁹ *Local Government Board v. Arlidge*, [1915] A. C. 120.

the governor and subordinate machinery — in so far as its field extends. Any other rule would mean chaos. It would mean the possibility of conflicting decisions, of situations in which, whatever the unfortunate subject of state regulation did, he would be violating some command; it would violate the basic ideas of common sense which underly the whole intensely practical question of administrative law.

There, then, is the frame into which we must fit our study of an individual commission. It is one portion of a body of administrative law. That body deals with the functioning of the machinery which transmits governmental power from the source of its origin to the point where it is applied in the form of an effective, enforced, active rule. Such power may be transmitted through great, general conduits — the usual governmental machinery. Much of that we study under constitutional law; too much of it we do not study at all. Or it may be transmitted in special conduits, reaching application through special instruments. The special conduit may branch from the main at any point. But after it has thus branched off, in its particular function it excludes the operation of the general device for transmission.

It is only at this last point that the subject of administrative law, as narrowly viewed, begins. But ought we not to endeavor to draw some general principles from the myriad monographs upon individual commissions and similar bodies? In a word, has there not been a real accumulation of precedent, from which we must derive the systematic body of law? Most important of all, can we continue to think upon the premise that any individual commission is, in its legal aspects, unrelated with the general government, or with other commissions?

Finally, *cui bono*? We have no right to follow academic northern lights if they lead to mere useless speculation. But we are using these administrative instruments. We are creating new ones. We are clutching, sometimes ill-advisedly, at them in an endeavor to use them to solve pressing problems. We are fearing them, lest they become tyrannous. It is necessary that each new body fall into some defined legal place. So alone shall we escape the dangerous and weakening period of floundering while business men, the administrative itself, and the courts solve what the sphere of the new

organism is to be. It is necessary that the constitutional principles be classified so that a commission need not spend a generation determining what are its powers. It is necessary to develop statutory construction in connection with the constitution to the end that the commission may be checked at the point where its tyranny may begin. These can be made certain only by a well-defined system of administrative law.

In any event, here is an angle of approach. It may well be erroneous. But if it is a working hypothesis, presenting an old problem from a point which has profitable suggestion, perhaps it may be of ultimate aid in liberating old administrative machinery from outworn limitations and in guarding the newer instruments from old ideas and older fears.

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